Supreme Court, U.S.
FILED
DEC 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-7194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARTHUR LAJUANE TAYLOR

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE PETITIONER

BRUCE DAYTON LIVINGSTON
(Appointed by this Court)
Counsel of Record
Guilfoil Petzall & Shoemake
100 N. Broadway, Suite 2000
St. Louis, MO 63102
(314) 241-6890

J. BENNETT CLARK
Gallop Johnson & Neuman
101 S. Hanley Road, Suite 1600
St. Louis, MO 63105
(314) 862-1200
Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED

Petitioner Arthur Lajuane Taylor was sentenced to enhanced punishment under 18 U.S.C. § 924(e)(1) (Supp. V 1987) as a person "with three previous convictions . . . for a violent felony." Section 924(e)(2)(B) defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year that . . . (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Section 924(e) fails to define "burglary" despite its diverse meanings under federal, state and common law. In a 2-1 decision, the court of appeals declared that petitioner's prior Missouri convictions for burglary in the second degree satisfy § 924(e)'s predicate "violent felony" offenses and concluded "that 'burglary' in the sentence enhancement statute means 'burglary' however a state chooses to define it."

The question presented is whether the court of appeals erred in holding that under 18 U.S.C. § 924(e) a "violent felony" includes any crime labeled a "burglary" by any state, and further, if the court of appeals erred, whether second degree burglary under Missouri law is a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii) (Supp. V 1987).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
1. Introduction	2
2. Proceedings In The District Court	3
3. Proceedings In The Court of Appeals	5
SUMMARY OF ARGUMENT	8
ARGUMENT	12
ONLY THOSE BURGLARIES AND SIMILAR CRIMES UNDER STATE LAW THAT INCLUDE AS AN ELEMENT OF THE OFFENSE NECESSARY FOR CONVICTION CONDUCT WHICH PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY TO OTHERS SHOULD BE CONSIDERED PREDICATE OFFENSES FOR SENTENCE ENHNACEMENT AS "VIOLENT FELON[IES]" UNDER 18 U.S.C. § 824(E) (SUPP. V 1987)	12
I. The Word "Burglary" As Used In 18 U.S.C. § 924(e)(2)(B)(ii) Is Ambiguous And Therefore Requires Resort To The Legislative History To Determine The Meaning That Congress Intended.	12
II. The Legislative History Reveals That Congress Intended To Include As Predicate Offenses Only Those Burglaries Punishable By A Term Of Imprisonment For More Than A Year Which Necessarily Involve Serious Potential Risk Of Physical Injury To Other Persons And To Eliminate As Predicate Offenses Those Burglaries Which Do Not Involve Such Risk.	15
III. The Eighth Circuit's Overbroad Interpretation Of The Word "Burglary" In Section 924(e)(2)(B)(ii) Improperly Leads To The Inclusion Of Offenses Which Do Not Necessarily Present A Serious Potential Risk Of Physical Injury To Others As Punishment Enhancing "Violent Felon[ies]."	19

Table of Contents Continued

	Page
IV. The Correct Test For Whether A Particular Crime Is A "Violent Felony" Predicate Offense For Sentence Enhancement Under 18 U.S.C. § 924(e)(2)(B-(ii) Is Whether Any Element Of That Offense *Necessary For Conviction* Requires "Conduct That Presents A Serious Potential Risk Of Physical Injury To Another."	23
A. Both The Statutory Language Of § 924(e)(2)(B) And Expressed Congressional Intent Establish That The Determination Of Whether A Given Conviction Constitutes A "Violent Felony" Should Not Require A Fact-Based Inquiry, But Instead A Determination Based Upon The Underlying Elements Of The Offense.	23
B. For Purposes Of Sentence Enhancement Under § 934(e)(2)(B), Burglary Should Be Defined As Any Crime Punishable By A Term Of Imprisonment Exceeding One Year And Consisting Of Entering Or Remaining Within A Building That Is Property Of Another With Intent To Engage In A Federal Or State Offense *That Involves As An Element Necessary For Conviction Conduct That Presents A Serious Potential Risk Of Physical Injury To Another.*	28
C. The Possibility That Some Burglary Convictions Involving Conduct That Presents A Serious Risk Of Physical Injury To Another Will Not Qualify As Enhancement Offenses Under Petitioner's Proposed Test Is Outweighed By The More Fundamental Concern That Alternative Tests Will Result In The Drastic Sentence Enhancement Of Persons Not Intended By Congress To Be Subject To Enhancement.	31

Table of Contents Continued

	Page
V. Petitioner's Convictions For Burglary Second Degree Are Not Predicate Offenses For Sentence Enhancement Under 18 U.S.C. § 924(e)(2)(B)(ii) Because The Government Has Not Demonstrated That The Pertinent Burglary Statutes Have An Element Necessary For Conviction That Involves A Serious Potential Risk Of Physical Injury To Another.	33
CONCLUSION	36
APPENDIX OF PERTINENT STATUTORY PROVISIONS	1a
1. 18 U.S.C. § 924(a)(1) (Supp. V 1987)	1a
2. 18 U.S.C. (Appendix) § 1202(c)(9) (Supp. II 1984)	1a
3. Fla. Stat. Ann. § 810.02 (West Supp. 1989)	1a
4. Cal. Penal Code § 459 (West 1988)	2a
5. Cal. Penal Code § 460 (West 1988)	2a
6. Mo. Rev. Stat. § 569.160 (1986)	2a
7. Mo. Rev. Stat. § 569.170 (1986)	3a
8. Mo. Rev. Stat. § 560.040 (1969) (Repealed 1979)	3a
9. Mo. Rev. Stat. § 560.045 (1969) (Repealed 1979)	3a
10. Mo. Rev. Stat. § 560.050 (1969) (Repealed 1979)	4a
11. Mo. Rev. Stat. § 560.055 (1969) (Repealed 1979)	4a
12. Mo. Rev. Stat. § 560.060 (1969) (Repealed 1979)	4a
13. Mo. Rev. Stat. § 560.070 (1969) (Repealed 1979)	4a
14. Mo. Rev. Stat. § 560.075 (1969) (Repealed 1979)	4a
15. Mo. Rev. Stat. § 560.080 (1969) (Repealed 1979)	5a
16. Mo. Rev. Stat. § 560.100 (1969) (Repealed 1979)	5a

TABLE OF AUTHORITIES

CASES:	PAGE
Adamo Wrecking Co. v. *United States*, 434 U.S. 275 (1978)	33
Bifulco v. *United States*, 447 U.S. 386 (1980)	33
Carter v. *United States*, *petition for cert. filed*, No. 88-7307 (May 22, 1989)	7
Dickerson v. *Banner Institute, Inc.*, 460 U.S. 103 (1983)	25, 26
I.N.S. v. *Cardoza Fonseca*, 480 U.S. 421 (1987)	18
Kolender v. *Lawson*, 461 U.S. 352 (1983)	33
Liparota v. *United States*, 471 U.S. 419 (1985)	33
Morissette v. *United States*, 342 U.S. 246 (1952)	8, 12
NLRB v. *Amax Coal Co.*, 453 U.S. 322 (1981)	8, 12
People v. *Malcolm*, 47 Cal. App. 3d 217, 120 Cal.Rptr. 667 (1975)	20
People v. *Nunez*, 7 Cal. App. 3d 655, 86 Cal. Rptr. 707 (1970)	20
People v. *Wilson*, 160 Cal. App. 2d 606, 325 P.2d 106 (1958)	20
Russello v. *United States*, 464 U.S. 16 (1983)	17
State v. *Thomas*, 360 S.W.2d 694 (Mo. 1962)	21
Taylor v. *United States*, No. 88-7194, *cert. granted*, 110 S. Ct. 231 (Oct. 10, 1989)	22, 23, 24, 28
United States v. *Brandenburg*, 144 F.2d 656 (3d Cir. 1944)	12, 13
United States v. *Chatman*, 869 F.2d 525 (9th Cir. 1989)	13, 20, 30, 33
United States v. *Headspeth*, 852 F.2d 753 (4th Cir. 1988)	17, 22, 24, 30
United States v. *Hill*, 863 F.2d 1575 (11th Cir. 1989)	13, 17, 27, 30
United States v. *Leonard*, 868 F.2d 1393 (5th Cir. 1989)	13, 19, 22, 25, 27
United States v. *Patterson*, 882 F.2d 595 (1st Cir. 1989)	27
United States v. *Sherbondy*, 865 F.2d 996 (9th Cir. 1988)	24 25, 27
United States v. *Taylor*, 864 F.2d 625 (8th Cir. 1989)	*passim*
United States v. *Turley*, 352 U.S. 407 (1957)	12 25, 30
United States v. *Vidaure*, 861 F.2d 1337 (5th Cir. 1988) *cert. denied*, 109 S. Ct. 1551 (1989)	24

Table of Authorities Continued

Page

STATUTES:

18 U.S.C. § 922(g) (Supp. V 1987) 2, 3
18 U.S.C. § 924(a)(1) (Supp. V 1987) 3, 35
18 U.S.C. § 924(e) (Supp. V 1987) ..... *passim*
18 U.S.C. § 924(e)(1) (Supp. V 1987) 3, 4, 5, 10
18 U.S.C. § 924(e)(2)(B) (Supp. V 1987) 12, 23, 24, 25, 28
18 U.S.C. § 924(e)(2)(B)(i) (Supp. V 1987) 24
18 U.S.C. § 924(e)(2)(B)(ii) (Supp. V 1987) ..... *passim*
18 U.S.C. (Appendix) § 1202(c)(9) (Supp. II 1984) (repealed) ..... *passim*
18 U.S.C. § 924(a)(1) (Supp. V 1987), *amended by* 18 U.S.C.A. § 924(a)(1) (West Supp. 1989) 5, 36
28 U.S.C. § 1254(1) (1982) 1
Ark. Rev. Stat. § 5-39-202 (1987) 22
Cal. Penal Code § 459 (West 1988) 20, 31
Cal. Penal Code § 460 (West 1988) 31
Fla. Stat. Ann. § 810.02 (West Supp. 1989) 14, 19, 20, 31
Mo. Rev. Stat. § 569.160 (1986) 7, 8, 14
Mo. Rev. Stat. § 569.170 (1986) 6, 8, 14, 19
Mo. Rev. Stat. § 560.040 (1969) (Repealed) 7, 14
Mo. Rev. Stat. § 560.045 (1969) (Repealed) 7, 8, 34
Mo. Rev. Stat. § 560.050 (1969) (Repealed) 7, 34
Mo. Rev. Stat. § 560.055 (1969) (Repealed) 7, 34
Mo. Rev. Stat. § 560.060 (1969) (Repealed) 7, 34
Mo. Rev. Stat. § 560.070 (1969) (Repealed) ... 7, 8, 21, 31, 34
Mo. Rev. Stat. § 560.075 (1969) (Repealed) 7, 32, 34
Mo. Rev. Stat. § 560.080 (1969) (Repealed) 7, 8, 14, 34
Mo. Rev. Stat. § 560.100 (1969) (Repealed) 7, 32
Md. Crim. L. Code Ann. § 31B (1986) 22
Tex. Penal Code § 30.03 (Vernon 1989) 13
Tex. Penal Code § 30.04 (Vernon 1989) 13
Career Criminal Amendments Act of 1986, Subtitle I of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified at 18 U.S.C. § 924(e) (Supp. V 1987)) 1, 2, 15, 17
Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 456 (1986) 10, 13, 14, 17, 29

Table of Authorities Continued

Page

MISCELLANEOUS

2 W. LaFave & A. Scott, *Substantive Criminal Law* (2d ed. 1987) 13, 14
H.R. Rep. No. 98-849, 99th Cong., 2d Sess. (1986) 15, 18, 25
H.R. 4768, 99th Cong., 2d Sess. (1986) 15, 25
H.R. 4639, 99th Cong., 2d Sess. (1986) 15, 16, 18, 25, 26
Armed Career Criminal Legislation: Hearing on H.R. 4768 Before the Subcomm. on Crime on the House Comm. on the Judiciary, 99th Cong., 2d Sess. (1986) 15, 18
Black's Law Dictionary (5th ed. 1979) 12

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 864 F.2d 625 (8th Cir. 1989) and is reprinted in the Joint Appendix. J.A. 33-45. A transcript of the Sentencing Proceedings before the United States District Court for the Eastern District of Missouri, the Honorable John F. Nangle, Chief Judge, is also reprinted in the appendix. J.A. 13-21.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1989, J.A. 32, and a petition for rehearing or rehearing en banc was denied on March 7, 1989. J.A. 46. The petition for a writ of certiorari was filed on May 6, 1989. The petition was granted on October 10, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS INVOLVED

Section 1402 of Subtitle I of the Anti-Drug Abuse Act of 1986, 18 U.S.C. § 924(e) (Supp. V 1987), provides in pertinent part:

> (e)(1) In the case of a person who violates section 922 (g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.
>
> (2) As used in this subsection

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.) the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the first section or section 3 of Public Law 96-350 (21 U.S.C. 955a et seq.) for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law; and

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT OF THE CASE

1. Introduction.

This case raises a question of interpretation of the term "violent felony," as used in a sentence enhancement provision applicable to persons convicted of possessing a firearm in violation of 18 U.S.C. § 922(g) and who have "three previous convictions . . . for a violent felony or a serious drug offense." Career Criminal Amendments Act of 1986, Subtitle I of the Anti-Drug Abuse Act of 1986, Pub. L.

No. 99-570, §§ 1401-02, 100 Stat. 3207, 3207-39 to 3207-40 (1986) (codified at 18 U.S.C. § 924(e)(1) (Supp. V 1987)). Specifically at issue are petitioner's prior convictions for burglary second degree under Missouri law. *See infra*, p. 6n.1. In defining "violent felony," Congress used the undefined term "burglary," 18 U.S.C. § 924(e)(2)(B)(ii) (Supp. V 1987), which is susceptible to varying meanings under state, federal and common law. In addition to enumerating specific offenses such as burglary in the definition of a "violent felony," Congress added a catchall provision which includes as predicate offenses those crimes that involve "conduct that presents a serious risk of physical injury to another." *Id.*

If petitioner's second degree burglary convictions are not within the purview of either the undefined term "burglary" or the catchall provision of § 924(e)(2)(B)(ii), he would not have the requisite three convictions for a "violent felony" that are needed for an enhanced sentence under § 924(e)(1). *See infra* pp. 33-35. In that event, reversal and remand for re-sentencing would be mandated under the pre-Sentencing Guidelines provision in effect at the time the offense was committed. *See* 18 U.S.C. § 924(a)(1) (Supp. V 1987) (providing five-year maximum sentence with opportunity for parole), *amended by* 18 U.S.C.A. § 924(a)(2) (West Supp. 1989). The enhanced sentencing provision provides for a mandatory minimum sentence of fifteen years without opportunity for parole. 18 U.S.C. § 924(e)(1).

2. Proceedings in the District Court.

Petitioner pleaded guilty on January 15, 1988 to Count III of the superseding indictment, J.A. 22, charging him with being a felon in possession of a firearm on February 2, 1987 in violation of 18 U.S.C. § 922(g). *See* Plea Agree-

ment, Jan. 15, 1988, ¶2. Petitioner had previously been convicted of two violent felonies against the person of another, Robbery First Degree and Assault with Force. Notice of Punishment Enhancement ¶¶ 3-4, J.A. 7. Under 18 U.S.C. §924(e)(1), petitioner would be subject to enhanced punishment if he had three prior convictions for a "violent felony." The Government notified petitioner that it would seek an enhanced sentence based upon the robbery and assault convictions, in combination with 1971 and 1963 convictions for Burglary Second Degree under Missouri law. Notice of Punishment Enhancement, J.A. 6-7. Certified copies of the burglary convictions, *id.* ¶¶ 1-2, as well as the robbery and assault convictions, *id.* ¶¶ 3-4, were ordered to be incorporated into the record at the time of sentencing. Transcript of Sentencing Proceedings, J.A. 20-21. The assault conviction in the fifth paragraph of the Notice of Punishment Enhancement could not be corroborated by the probation office, was withdrawn by the Government and not considered by the district court for enhancement purposes. J.A. 17-18, 20.

At petitioner's sentencing on March 12, 1988, the Honorable John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri, denied petitioner's Motion to Strike [the Government's] Notice of Punishment Enhancement, J.A. 21, and sentenced petitioner to a term of 15 years imprisonment without possibility of parole, pursuant to the enhancement statute. J.A. 20. As a condition of defendant's agreement to plead guilty, petitioner retained the right to appeal the issue of whether he had the requisite three convictions for "violent felon[ies]" that would subject him to punishment enhancement under 18 U.S.C. §924(e)(1). *See* Transcript of Sentencing Proceedings, J.A. 13.

3. Proceedings in the Court of Appeals.

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit on the sole issue of whether his sentencing pursuant to the enhancement statute, 18 U.S.C. §924(e)(1), was proper. Petitioner argued that his convictions for burglary in the second degree under Missouri law were not "violent felonies" under the enhancement statute, Ct. A. Br. at 4, and therefore that he should have been sentenced to a *maximum* sentence of five years imprisonment *with* the possibility of parole under the provisions of former section 924(a)(1). 18 U.S.C. §924(a)(1) (Supp. V 1987), *subsequently amended* 18 U.S.C.A. §924(a)(1) (West Supp. 1989).

A divided panel of the court of appeals (McMillian & Fagg, JJ., with Bright, Sr. J., dissenting) affirmed the district court's sentence. J.A. 33-36. The panel majority held that "burglary," as used by Congress in the definition of "violent felony" in §924(e)(2), is unambiguous and "means 'burglary' however a state chooses to define it." J.A. 36. On that basis the majority determined that petitioner's second degree burglary convictions subjected him to the mandatory minimum sentence enhancement of fifteen years imprisonment without chance for parole under §924(e). The panel majority reached this conclusion notwithstanding that certain conduct which would be labeled a "burglary" in some states, *e.g.*, Missouri, would not be so denominated in certain other states, *e.g.*, Maryland. J.A. 38 (Bright, Sr. J., dissenting).

As Senior Judge Bright noted in dissent, the term "burglary" is ambiguous because the range of conduct in contemporary offenses labeled "burglary" varies widely and is significantly different from the common law: the

breaking and entering of a dwelling of another in the nighttime with the intent to commit a felony. J.A. 37. Judge Bright disagreed with the majority's conclusion only after "careful examination of the federal statute and its legislative history." J.A. 37. Had the majority examined the legislative history of section 924(e), it would have realized that Congress specifically *deleted* from the statute a broad definition of burglary that would have included the burglary convictions relied upon by the majority, as well as most other state law burglaries. J.A. 39-40, 42-43. Judge Bright determined that the statute as amended was intended to include as predicate offenses only those burglaries which present a "serious potential risk of injury to the person." J.A. 42.

Moreover, Judge Bright criticized the majority opinion because it led to the anomalous result that identical conduct would lead to dramatically different sentences based solely upon the nomenclature given an offense, rather than upon the underlying conduct itself. "I do not believe the application of a federal sentence enhancement provision should turn on the differing labels given to similar conduct by the various states." J.A. 39.

Finally, Judge Bright analyzed the current Missouri statutory framework and concluded that burglary in the second degree[1] is neither a "violent felony" nor within

[1] The Missouri burglary statute upon which both petitioner and the Government have to date focused in proceedings before the district court, court of appeals and this Court, differs to some degree from the statute in force at the time of the subject burglary convictions. As Judge Bright noted in his dissent, petitioner's burglary convictions pre-dated the enactment of Mo. Rev. Stat. § 569.170 (1986), which became effective January 1, 1979. J.A. 38 n.1. Judge Bright assumed that the revision did not make a substantive change in the statute, as

§ 924(e)'s catchall statutory phrase, ". . . or otherwise involves conduct that presents a serious risk of physical injury to another." J.A. 43.

Missouri law, by definition, distinguishes burglaries which are potentially violent and those not

applied to petitioner. *Id.*

While the Missouri burglary statutes that pre-dated the current versions of first and second degree burglary are substantively different from them, they too distinguished between degrees of burglary and retained the emphasis upon potential for violence to persons in "Burglary in First Degree." *See* Mo. Rev. Stat. § 560.040 (1969) (repealed 1979) (first degree burglary when breaking and entering occupied dwelling house of another either forcibly, while armed or by picking the lock). In its predecessor burglary statutes, Missouri had seven separate offenses denominated as Burglary in the Second Degree and one identified as Burglary with Explosives. *See* Mo. Rev. Stat. §§ 560.045-.060, .070-.080, .100 (1969) (repealed 1979). Under the prior Missouri statute, Burglary with Explosives by its nature could be only first degree burglary under the successor (current) statute. *Compare* Mo. Rev. Stat. § 560.100 (1969) (repealed 1979) (burglary with explosives) *with id.* § 569.160(1) (1986) (burglary involving use of explosives would be first degree burglary under current statute). The other second degree burglaries under the prior statute included conduct that could fall into either degree of burglary in the successor statute. *See, e.g.*, Mo. Rev. Stat. § 560.070 (1969) (repealed 1979) (would include burglary of a store, whether occupied or not).

Crimes labeled burglary second degree under Missouri's prior, repealed statute could have included unarmed burglaries of unoccupied structures, which would have had less potential for violence than the burglaries sought to be reviewed by the Government in *Carter* v. *United States*, *petition for cert. filed*, No. 88-7307, (U.S. May 22, 1989), which apparently involved the burglary of an occupied building. *See* Brief of the United States at nn.1 and 3, *Carter* v. *United States*, *supra*. As such, the instant case is the more appropriate vehicle for reviewing the ambiguity inherent in § 924(e)(2)(B)(ii), irrespective of whether the focus herein is upon Missouri's past or present burglary statute. *See infra*, pp. 33-35.

> showing violence or threats of violence. Burglary in the first degree encompasses entry into a building when armed or when the burglar causes or threatens physical injury to a person not a participant in the crime, or where a person other than a participant is present in the building. In contrast, burglary in the second degree quoted in the majority opinion at [J.A. 35], may relate to an unarmed burglary of an unoccupied building.
>
> Thus, the conviction for second degree burglary under Missouri law, relating as it does to entry into a structure without an occupant, poses no threat of harm to persons.

J.A. 44 (citations omitted) (discussing Mo. Rev. Stat. §§ 569.160-.170 (1986)). As set forth *supra* n. 1, many of the second degree burglaries under Missouri's predecessor burglary statute were likewise non-violent, because they too could involve unarmed burglaries of unoccupied buildings. *See, e.g.*, Mo. Rev. Stat. §§ 560.045, 560.070, 560.080 (1969) (repealed 1979).

Judge Bright also noted that the majority opinion had ignored established precedent of this Court: when federal statutes use undefined terms which have an accepted common law meaning, it is presumed that Congress intended the common law meaning to control. J.A. 37 (citing *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981) and *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)). He concluded that because "burglary" was not defined in the statutory framework of section 924(e), Congress must have intended to employ the common law meaning of burglary in the sentence enhancement statute. J.A. 42-43.

SUMMARY OF ARGUMENT

The Eighth Circuit erred in holding that any crime labeled a "burglary" by any state constitutes a predicate

offense for sentence enhancement under 18 U.S.C. § 924(e) as a "violent felony." Notwithstanding the use of the word "burglary" by Congress in the definition of "violent felony," the Eighth Circuit's interpretation would improperly include as predicate offenses such crimes as shoplifting, breaking into a pay telephone, and unarmed burglaries of unoccupied structures, including automobiles. This overbroad interpretation arises from the panel majority's erroneous finding that the undefined term "burglary" is unambiguous. To the contrary, when undefined, "burglary" *is* ambiguous because it has been given numerous definitions at federal, state and common law.

This ambiguity necessitates resort to the legislative history to attempt to determine what Congress meant when it drafted the definition. The legislative history indicates that when Congress used the term "burglary" in the definition of "violent felony," it only intended to include those burglaries and other crimes against property which involve conduct presenting a serious potential risk of physical injury to others. Many burglaries do not present such a risk. Significantly, the two previous ways in which Congress included nearly all burglaries within the scope of a categorical definition, whether "violent felony" or "crime of violence," were considered and eliminated by Congress when it adopted the present definition of violent felony.

The Eighth Circuit's inclusion of a crime as a predicate offense based solely upon its nomenclature cannot be correct, because such a test results in the inclusion of offenses which by definition include elements that do not necessarily or even possibly involve conduct which presents a serious potential risk of physical injury to another. Inclusion of such offenses offends Congressional intent, as

evidenced by the legislative history and the statute's bald language: "*violent* felony." 18 U.S.C. § 924(e)(1) (emphasis added). The Eighth Circuit's test further results in identical, non-violent conduct—*e.g.*, unarmed break-ins to unoccupied structures or vehicles—being subject to vastly different penalties, based solely upon differing labels employed by sundry state legislatures. The Eighth Circuit's interpretation of the statutory definition incongruously includes many non-violent felonies, and thus is inconsistent with the definition intended by Congress and the plain language of the statute itself.

Contrary to the Government's position, the generic definition of burglary in the repealed federal statute, Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 456, 458-59 (1986) (essentially reincorporating into § 924(e) with minor changes 18 U.S.C. (Appendix) § 1202(c)(9) (Supp. II 1984) (repealed)), standing alone, cannot be the federal interpretation of the word burglary, because that definition was specifically deleted from the statute as part of the enactment of the pertinent statutory language at issue, 18 U.S.C. § 924(e).

Petitioner suggests that this Court should construe the enhancement provision by limiting the term "burglary" to those crimes under state law which by definition include an element necessary for conviction that involves conduct that presents a serious potential risk of physical injury to others. This construction is consistent with the plain language of the term which burglary is modifying, "*violent* felony." Moreover, this categorical approach eliminates the need for mini-trials and investigations into the underlying circumstances of crimes which may have been committed in the distant past, thereby avoiding the attendant problems of witness availability and faded memories. This categorical, "violence as an element of the offense" test

also comports with the intentions of Congress as reflected in the legislative history.

Similarly, this Court should construe the catchall clause of § 924(e)(2)(B)(ii) (". . . or otherwise involves conduct that presents a serious potential risk of physical injury to another") so as to include only those offenses which include such risks as an element of the offense.

The Government may contend that petitioner's suggested approach will result in some potentially violent burglaries being disqualified from use for purposes of enhancement. Theoretically, this is especially possible where the subject conviction is under a state statute that proscribes equally both conduct that is potentially violent *and* conduct that is not so. This threat may be illusory, however, given that it is often impossible to ascertain whether or not a conviction obtained under such statutes involved potentially violent conduct. Be that as it may, the possibility that such potentially violent conduct will "slip through the cracks" is outweighed by the certainty that many "non-violent" burglaries will force enhancement under either of the respective standards embraced by the Government and by the Eighth Circuit below. Such a result—which is at odds with the statutory language and Congressional intent—would offend principles of due process and the rule of lenity.

Burglary second degree under current or prior Missouri law is not necessarily a crime of violence. Therefore, the court of appeals' enhancement of petitioner's sentence based upon such convictions should be reversed.

ARGUMENT

ONLY THOSE BURGLARIES AND SIMILAR CRIMES UNDER STATE LAW THAT INCLUDE AS AN ELEMENT OF THE OFFENSE NECESSARY FOR CONVICTION CONDUCT WHICH PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY TO OTHERS SHOULD BE CONSIDERED PREDICATE OFFENSES FOR SENTENCE ENHANCEMENT AS "VIOLENT FELON[IES]" UNDER 18 U.S.C. § 924(e) (SUPP. V 1987).

I. The Word "Burglary" As Used In 18 U.S.C. § 924(e)(2)(B)(ii) Is Ambiguous And Therefore Requires Resort To The Legislative History To Determine The Meaning That Congress Intended.

Although Congress used the word "burglary" in its definition of "violent felony," 18 U.S.C. § 924(e)(2)(B),[2] it failed to define that term. *See* 18 U.S.C. § 921 (1982 & Supp. V 1987). "Burglary" is ambiguous, because it is unclear whether the term refers to common law burglary,[3] to crimes having common set of elements,[4] or to

---

[2] A "violent felony" is:

> Any crime punishable for a term exceeding one year that—
>
> (i) Has as an element the use, attempted use, or threatened use, of *physical force against the person of another*; or
>
> (ii) Is *burglary*, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B) (emphasis added).

[3] When "a federal criminal statute uses a common law term of established meaning without otherwise defining it, the general practice is to give that term its common law meaning." *United States* v. *Turley*, 352 U.S. 407, 411 (1957). *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). Common law burglary "consisted of a breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein." *Black's Law Dictionary* 179 (5th ed. 1979).

[4] *See United States* v. *Brandenburg*, 144 F.2d 656 (3d Cir. 1944). "Burglary" as used in the Fugitive Felon Act refers only to those state and federal statutes that have the same elements as common law burglary. *Id.* at 662.

any of the various crimes that the states and Congress[5] have labeled burglary. The term "burglary" has no fixed, universally accepted definition, and thus is not susceptible to a uniform interpretation. *See United States* v. *Hill*, 863 F.2d 1575, 1582 n.5 (11th Cir. 1989) (collecting statutes in thirty-six states and showing wide range of proscribed conduct).

Of the statutes examined in *Hill*, twenty-six "varied the degree of the burglary by the type of structure, whether the structure was occupied, when the burglary occurred and/or whether injury occurred or was threatened." *Id.* Some modern burglary statutes would permit a "burglary conviction for such acts as stealing from an unoccupied phone booth, car or cave." 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.13(g) at 477 (2d ed. 1987) [hereinafter *LaFave & Scott]*. For example, shoplifting constitutes burglary under the California statute, *see United States* v. *Chatman*, 869 F.2d 525, 529 n.2 (9th Cir. 1989), and breaking into a vending machine or automobile is burglary under the Texas statute. Tex. Penal Code Ann. §§ 30.03 (coin-operated machine), and 30.04 (vehicle) (Vernon 1989). *See United States* v. *Leonard*, 868 F.2d

---

[5] In a predecessor statute to § 924(e), Congress defined burglary as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. (Appendix) § 1202(c)(9) (Supp. II 1984). That definition was substantially reincorporated into § 924(e)—for a period of approximately five months until adoption of the present statutory language from the Career Criminals Amendments Act of 1986—by the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 456, 458-59 (1986). It is anticipated that the Government will urge the adoption of this definition in the present case. However, as noted below, such a test would lead to convictions for non-violent crimes like shoplifting (under California law) being used as predicate "violent felonies," clearly an unfair and unintended result.

1393, 1935 n.2 (5th Cir. 1989). Such acts do not necessarily involve a serious risk of physical harm to other persons. Although common law burglary—the breaking and entering of a dwelling house of another in the nighttime—might more plausibly be said to carry such a risk, modern statutory burglary "has little in common with its common law ancestor except for the title of burglary." *LaFave & Scott* at 476.

Thus, the term burglary has varying, inconsistent meanings, some involving potential physical violence toward other persons, others involving only various forms of trespass to property. *Compare* Mo. Rev. Stat. § 569.160 (1986) (entry with intent to commit felony when either burglar is armed, structure is occupied, or burglar threatens harm); *id.* § 560.040 (1969) (repealed 1979) (breaking and entering occupied dwelling house forcibly or while armed) *with* Mo. Rev. Stat. § 569.170 (1986) (unarmed entry into unoccupied structure); *id.* § 560.080 (1969) (repealed 1979) (breaking and entering vacant, unoccupied building). *Cf.* Fla. Stat. Ann. § 810.02.(3) (third degree burglary is unarmed entry into unoccupied structure or conveyance) (West Supp. 1989).

The ambiguity of "burglary" is highlighted by the failure of Congress to define the term in the statute at issue here, Section 924(e). *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 456, 458 (1986) (containing prior definition of burglary, which was deleted when present § 924(e) was adopted by passage of the Career Criminals Amendments Act of 1986). This ambiguity necessitates resort to the legislative history to determine Congressional intent, as Judge Bright properly observed in his dissent. J.A. 39.

II. The Legislative History Reveals That Congress Intended To Include As Predicate Offenses Only Those Burglaries Punishable By A Term Of Imprisonment For More Than A Year Which Necessarily Involve Serious Potential Risk Of Physical Injury To Other Persons And To Eliminate As Predicate Offenses Those Burglaries Which Do Not Involve Such Risk.

The present version of § 924(e) was enacted as part of the Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1401, 100 Stat. 3207, 3239 (1986). In passing this act, Congress hoped to increase federal law enforcement participation "in efforts to curb armed, habitual drug traffickers, and *violent* criminals." H.R. Rep. No. 98-849, 99th Cong., 2d Sess. 1 (1986) (emphasis added) [hereinafter "*House Report*"]. Section 924(e)'s legislative history reveals Congress' concern with violence against persons, not property.

Initial drafts of this legislation contained no reference to burglary. *See* H.R. 4768, 99th Cong., 2d Sess. (1986); H.R. 4639, 99th Cong., 2d Sess. (1986) (identical companion bill to S. 2312, 99th Cong., 2d Sess. (1986)), *both versions reprinted in Armed Career Criminal Legislation: Hearing on H.R. 4768 Before the Subcomm. on Crime on the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 3-6 (1986) [hereinafter "*House Hearing*"]. Instead, these bills limited the predicate prior convictions for enhanced punishment to serious controlled-substance crimes and felonies that had as an element the use, attempted use, or threatened use of *physical force against a person*, H.R. 4768 § 2(b), or to "any felony which, by its nature, involves a *substantial risk that physical force against the person or property of another* may be used in the course of committing the offense." H.R. 4639 § b.

These two bills thus reflect widely differing approaches to the definition of the predicate offense, "violent felony," one limiting the predicate offense to crimes against the person, the other defining it much more broadly to include crimes with the potential for physical force against property. In compromising between these two approaches, Congress agreed to include certain property crimes, but *only when they involved risk of injury to a person.*

> The other major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of "violent" felony. The subcommittee agreed to add the crimes punishable for a term exceeding one year that involved conduct that presents a serious potential risk of physical injury to others. *This will add State and Federal crimes against property such as burglary,* arson, extortion, use of explosives and similar crimes as predicate offenses *where the conduct involved presents a serious risk of injury to a person.*

House Report at 3 (emphasis added). The above quotation is the source of the language now codified in § 924(e)(2)(B-)(ii), the violent felony definition which describes those convictions which may subject a defendant to punishment enhancement. From this Congressional finding it is very clear that *not all burglaries are necessarily predicate offenses*. Only when the burglary "presents a serious risk of injury to a person" did Congress intend for it to qualify as a predicate offense for punishment enhancement. *Id.*

Prior to passage of the Career Criminals Amendment Act of 1986, *supra*, Congress had provided for penalty enhancement in connection with the sentencing of repeat offenders on weapons charges. *See* Armed Career Criminal Act of 1984, part of Pub. L. No. 98-473, § 1802, 98 Stat. 1837, 2185, *codified at* 18 U.S.C. (Appendix) § 1202 (1982

& Supp. II 1984) (subsequently repealed by Firearms Owners' Protection Act, Pub. L. No. 99-308, §§ 102, 104, 100 Stat. 451-53, 456-59 (1986)). Under former § 1202, burglary was a predicate offense for punishment enhancement and was defined very broadly. It included any felony consisting of "entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. (Appendix) § 1202(c)(9) (Supp. II 1984) (repealed).

When Congress repealed § 1202 with the Firearms Owners' Protection Act, *supra*, it briefly reinstated in substantial part § 1202's broad definition of burglary into 18 U.S.C. § 924(e). *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 456, 458 (1986). About five months after passage of the Firearms Owners' Protection Act, Congress replaced that definition with the provision at issue in this case. *See* Career Criminal Amendments Act of 1986, Pub. L. No. 99-570, §§ 1401-02, 100 Stat. 3207, 3207-39 to 3207-40 (1986). The federal courts of appeal have observed that the former statutory definition of burglary contained in § 1202(c)(9), and briefly in § 924(e), encompassed practically all offenses termed "burglary" in any state. *See United States* v. *Hill*, 863 F.2d 1575, 1578-79 (11th Cir. 1989). *See also* J.A. 39-40 (quoting *United States* v. *Headspeth*, 852 F.2d 753, 757 (4th Cir. 1988)).

The deletion of the former, broad definition of burglary from the statutory provision at issue is very significant. "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983). Because Congress specifically eliminated the former, broad definition

of burglary from § 924(e) when it passed the Career Criminal Amendments Act of 1986, that former definition was not intended to control. *Id.*

It is equally significant that the rejected language proposed by Senator Specter in S.2312 and the companion House Bill, H.R. 4639, which would have included all burglaries as predicate offenses, survives in the same section of the code. *See* 18 U.S.C. § 924(c)(3) ("crime of violence" includes use of "physical force against property of another"). *Cf.* H.R. 4639 *reprinted in House Hearing* at 4 ("violent felony" includes use of "physical force against property of another"). "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in disparate inclusion or exclusion.'" *I.N.S.* v. *Cardoza Fonseca*, 480 U.S. 421, 432, 107 S. Ct. 1207, 1213 (1987) (quoting *Russello* v. *United States*, 464 U.S. at 23).

In passing the Career Criminal Amendments Act, Congress was refining the sentence enhancement provision with a change in emphasis from robbery and burglary to "serious drug offense[s]" and "violent felon[ies]," like kidnapping, murder and rape. Although Congress sought to enlarge the overall scope of the penalty enhancement provision, it only intended to include as predicate offenses those crimes which carried a serious risk of physical injury to others. *See House Hearing* at 26 (comments of Rep. Hughes, Sponsor of H.R. 4768, Chmn. of Subcomm. Hearing, and Author of *House Report*) ("not inadvertent that we left it [burglary] out"); *House Report* at 3 ("will add . . . burglary . . . where the conduct involved presents a serious risk of injury to a person"); *id.* at 4, 5.

In short, the Congressional history refutes the Eighth Circuit majority's conclusion that *any* conviction denominated a burglary constitutes a predicate offense for enhanced punishment. This Court should construe the statute so as to effect Congress' expressed intent: to include as predicate offenses only those burglaries which carry a serious risk of physical injury to non-participants.

III. The Eighth Circuit's Overbroad Interpretation Of The Word "Burglary" In Section 924(e)(2)(B)(ii) Improperly Leads To The Inclusion Of Offenses Which Do Not Necessarily Present A Serious Potential Risk of Physical Injury To Others As Punishment Enhancing "Violent Felon[ies]."

The Eighth Circuit panel majority concluded "that 'burglary' in the sentence enhancement statute means 'burglary' however a state chooses to define it." J.A. 36. This rule, if accepted, would include as predicate offenses many property crimes that are clearly non-violent and do not present a "serious potential risk of physical injury to another." *See* 18 U.S.C. § 924(e)(2)(B)(ii). *See also United States* v. *Leonard*, 868 F.2d 1393, 1395 (5th Cir. 1989) (Fifth Circuit applies same test as Eighth Circuit) (burglary is "violent felony" for enhancement purposes "without regard to whether the underlying conduct involved actual or potential violence").

Numerous crimes labeled "burglary" by one state or another have no potential risk of physical injury to another. *See, e.g.*, Mo. Rev. Stat. § 569.170 (1986) (burglary second degrees includes unarmed entry or remaining surreptitiously in unoccupied structure)[6]; Fla. Stat. Ann. § 810.02(3) (West Supp. 1989) (burglary third

---

[6] The Missouri second degree burglary statute is nearly identical to the definition of burglary in the predecessor statutes to § 924(e), which definition was *deleted* from present § 924(e) by Congress. *Compare* Mo. Rev. Stat. § 569.170 (1986) *with* 18 U.S.C. (Appendix) § 1202(c)(9) (Supp. II 1984) (repealed).

degrees is unarmed entry or remaining in unoccupied conveyance or structure that is not a dwelling). The Florida statute expressly requires that such conduct be charged as third degree burglary and that other potentially violent conduct be charged as higher degree of burglary. Fla. Stat. Ann. § 810.02(3) (after defining potentially violent conduct as higher degrees of burglary, provides "otherwise, burglary is a felony of the third degree. . .").

Other states also include unarmed entry into unoccupied buildings and structures as burglary, while also prohibiting conduct that may present a risk of physical injury to others. For instance, California's burglary statute provides:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, . . . [or] vehicle as defined by the Vehicle Code when the doors are locked . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.

Cal. Penal Code § 459 (West 1988). Under that statute, such non-violent crimes as the unarmed burglary of an unoccupied auto and shoplifting are deemed "burglary." *See United States* v. *Chatman*, 869 F.2d 525, 528-29 (9th Cir. 1989) (entry through unsecured window of automobile without force is burglary) (citing *People* v. *Malcolm*, 47 Cal. App. 3d 217, 120 Cal. Rptr. 667 (1975)); *People* v. *Wilson*, 160 Cal. App. 2d 606, 325 P.2d 106 (1958) (burglary is entry of store when open to public with intent to commit theft [*i.e.*, shoplifting]), *cited in Chatman*, 869 F.2d at 529 n.2. The California statute, however, by its terms includes within its scope conduct that is potentially violent, such as the entry, armed or unarmed, into an occupied structure. *See, e.g., People* v. *Nunez*, 7 Cal. App. 3d 655, 662, 86 Cal. Rptr. 707, 712 (1970).

Likewise, one of Missouri's former statutes for burglary in the second degree would allow conviction for breaking and entering a building containing goods or other valuable things with the intent to steal. Mo. Rev. Stat. § 560.070 (1969) (repealed 1979). *See State* v. *Thomas*, 360 S.W.2d 694, 696-97 (Mo. 1962) (indictment alleging breaking and entering with intent to steal was insufficient for failing to allege presence of goods or other merchandise in building). The former Missouri statute, like the California statute, includes a broad range of conduct within its scope, including that which is potentially violent:

> *Burglary involving breaking and entering enclosures besides dwelling places.* Every person who shall be convicted of breaking and entering any building, the breaking and entering of which shall not be declared by any statute of this state to be burglary in the first degree, or any booth or tent, or any boat or vessel, or railroad car in which there shall be at the time *any human being or any goods, wares, merchandise or other valuable thing kept or deposited*, with the intent to steal or commit any crime therein, shall, on conviction, be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.070 (1969) (repealed 1979) (emphasis added). Thus, the defective indictment in *State* v. *Thomas* could also have been cured by alleging the presence of a person in the building. 360 S.W.2d at 697.

Although the California statute, the repealed Missouri statute and others like them would include burglaries of occupied buildings and thus have the potential for violence to another person, these statutes nevertheless allow conviction for offenses such as shoplifting, breaking into a pay telephone, and the burglary of unoccupied buildings, none of which pose a serious risk of physical injury to

another. *See, e.g., United States* v. *Leonard*, 868 F.2d 1393, 1395 & n.2 (5th Cir. 1989) (enhancement possible based upon burglary of coin-operated machine or vehicle). Such "non-violent" burglaries will be classified as "violent felonies" under the Eighth Circuit's test.

The panel majority's holding raises serious constitutional concerns. Application of the majority's opinion reaches the anomalous result that when conduct which is labeled a burglary in Missouri takes place in states which label such conduct as something else, *i.e.*, "breaking and entering" or "storehouse breaking," that identical conduct will not be subject to punishment enhancement under § 924(e) merely because of where it took place. *See, e.g.*, Ark. Crim. Code. Ann. § 5-39-202 (1987) (conduct labeled breaking and entering); Md. Crim. L. Code Ann. § 31B (1986) (conduct labeled breaking and entering storehouse), *cited in United States* v. *Headspeth*, 852 F.2d 753, 756 (4th Cir. 1988). Although many states, *e.g.*, Florida and Missouri, differentiate between "violent" and "non-violent" burglaries by assigning lesser degrees to less offensive conduct, others differentiate less clearly. *See supra* at 20. Thus, under the panel majority's decision, sentence disparity would arise based solely on the variation in the title of the offenses in different states. This Court should reject a test that leads to such unintended, unwise and presumably unconstitutional results.

The Government has acknowledged this flaw in the Eighth Circuit's position. In opposing certiorari in the case at bar the Solicitor General, while not confessing error, stated his disagreement with the panel majority's holding "that 'burglary' in the sentence enhancement statute means 'burglary' however a state chooses to define it," J.A. 36. *See* Brief for the United States in Opposition to Certiorari at 13-14, *Taylor* v. *United States*, No.

88-7194, *cert. granted*, 110 S. Ct. 231 (Oct. 10, 1989) [hereinafter "Brief in Opposition to Certiorari"]. Thus, both parties herein disagree with the test employed by the Eighth Circuit—the most expansive interpretation among the circuits. *See* Brief in Opposition to Certiorari at 14. As set forth *infra*, the definition of "burglary" advocated by the Government and accepted by several other circuit courts to construe the meaning of the predicate offense "violent felony" is also seriously flawed, thus necessitating reversal.

IV. The Correct Test For Whether A Particular Crime Is A "Violent Felony" Predicate Offense For Sentence Enhancement Under 18 U.S.C. § 924(e)(2)(B)(ii) Is Whether Any Element Of That Offense *Necessary For Conviction* Requires "Conduct That Presents A Serious Potential Risk Of Physical Injury To Another."

A. Both The Statutory Language Of § 924(e)(2)(B) And Expressed Congressional Intent Establish That The Determination Of Whether A Given Conviction Constitutes A "Violent Felony" Should Not Require A Fact-Based Inquiry, But Instead A Determination Based Upon The Underlying Elements Of The Offense.

Although the Eighth Circuit's test is overbroad, as conceded by the Solicitor General, it is a tacit recognition that the statutory definition of violent felony requires a categorical approach, rather than a test necessitating examination of the underlying facts of purported predicate offenses. To the extent that the Eighth Circuit employed such a categorical standard to determine whether a crime constitutes a predicate offense, its approach is consistent with the statutory "violent felony" definition and the analyses of the other circuits, as discussed below.

The categorical and elemental framework of § 924(e)(2)(B) established a uniform federal standard for

the selection of predicate offense violent felonies based upon the underlying element or category of conviction. 18 U.S.C. § 924(e)(2)(B) (subdivision (i) based upon elements, and subdivision (ii) based upon categorization of the underlying conviction). This approach eliminates the need to examine specific underlying conduct on a case-by-case basis (as opposed to merely examining the elements of the underlying state conviction).

Subdivision (i) indisputably takes this approach, including as predicate offenses crimes punishable by more than a year in prison that have "as an *element*" the "use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). Subdivision (ii) establishes as predicate offenses, first, specific categories of crimes, and, second, crimes that "otherwise" involve conduct which presents a serious risk of potential physical injury to another. 18 U.S.C. § 924(e)(2)(B)(ii). The specific enumeration of offenses, in combination with the use of the "or *otherwise* involves conduct" language, represents a categorical approach that selects as predicate offenses those crimes that present a risk of physical injury to others. *See United States* v. *Sherbondy*, 865 F.2d 996, 1005-10 (9th Cir. 1988); *United States* v. *Vidaure*, 861 F.2d 1337, 1341 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1551 (1989); *United States* v. *Headspeth*, 852 F.2d 753, 758-59 (4th Cir. 1988) (all holding that such a categorical approach follows from the language of subdivision (ii)).

The Solicitor General also advocates a categorical approach, urging that "burglary" in subdivision (ii) should be governed by categorical analysis of the underlying offense, albeit through reference to elements of the previous, deleted statutory definition in § 1202(c)(9) and former § 924(e). *See* Brief in Opposition to Certiorari at 11. "The government argues that the trial court need only

consider such offenses in their generic sense, without looking to the underlying conduct to determine whether it involved the risk of violence." *United States* v. *Leonard*, 868 F.2d 1393, 1395 (5th Cir. 1989).

The legislative history of § 924(e)(2)(B) suggests the appropriateness of a categorical approach. Both bills from which subdivision (ii) developed defined the predicate offense by reference to the "nature" or "element" of the offense under state law. *Cf.* H.R. 4768, 99th Cong., 2d Sess. (1986); H.R. 4639, 99th Cong., 2d Sess. (1986). The House Report describes subdivision (ii) categorically: "State and Federal felonies against property that present a serious potential risk of physical injury to a person." *House Report* at 4.

Moreover, this Court has previously construed the predecessor statute, from which this statute grew, as a matter of federal law even though the underlying predicate offense is a creature of state law. *Dickerson* v. *Banner Institute, Inc.*, 460 U.S. 103, 111-12 (1983). "This makes for desirable national uniformity unaffected by varying state laws, procedures, and definitions of 'conviction.'" *Id.* at 112. Similarly, application of a federal, elemental standard to the predicate offense terms in subdivision (ii) of the current statute would ensure uniformity, notwithstanding the varying state law roots of the underlying convictions. Such a result is consistent with the well-established rule of construction that this Court employed in *United States* v. *Turley:* "[I]n the absence of a plain indication of an intent to incorporate diverse state law into a federal criminal statute, the meaning of the federal statute should not be dependent on state law." 352 U.S. 407, 411 (1957). *See Sherbondy*, 865 F.2d at 1005 (rejecting state law as controlling § 924(e)'s definition of "violent felony").

Further support for a uniform, federal standard in this case arises from past use of that approach in similar situations, as the dissent in *Banner Institute* noted. *See* 460 U.S. at 123-24 (Rehnquist, J., dissenting). Other similar provisions in federal statutes are an appropriate reference for determining the meaning of the disputed term in federal statutory interpretation cases. *Id.* Federal definitions of terms similar to "violent felony" exist as a reference for comparison. Several statutes refer to "crime of violence" and define the term categorically based on the elements of an underlying offense. *See, e.g.*, 18 U.S.C. §§ 16, 924(c)(3), and 3156(a)(4). These statutes are significant in how they define "crime of violence;" their broader substantive definition is not significant because it was presented to Congress and rejected in H.R. 4639.

Finally, considerations of policy support this construction. If status as a predicate offense depends upon the actual facts of the underlying conduct (as opposed to the elements of the offense), courts will be deluged with mini-trials seeking to examine conduct which may be long past. This case demonstrates the difficulties inherent in attempting to ascertain the specific conduct underlying old convictions. Petitioner's burglary convictions were from 1971 and 1963. J.A. 6, 18. It is known that these convictions were for burglary second degree, but it is not known under which specific statutes defendant was convicted. *See infra* pp. 33-34. Witnesses may no longer be available or even alive, and if they can be located, the passing years render their memory inherently unreliable. Evidence may have been destroyed or lost, such as the police files of the 1963 burglary conviction referenced in paragraph one of the Government's Notice of Punishment Enhancement, J.A. 6, which could not even be located. J.A. 11. If the convictions occurred in different states, as

petitioner's did, J.A. 6-7, the difficulties are magnified by the complications of distance.

In summary, a categorical, elemental approach to determine what convictions satisfy § 924(e)'s definition of "violent felony" is supported by the statutory language which classifies crimes by element in subdivision (i) and by category in subdivision (ii). The previous interpretations of similar federal terms, *e.g.*, "crime of violence," have employed such an approach, as has every court of appeals interpreting this specific subdivision. Whether the approach be the Eighth and Fifth Circuit's "name of the offense" categorization, J.A. 36; *United States* v. *Leonard*, 868 F.2d at 1395; the Third, Sixth, Seventh and Eleventh Circuit's reference to former § 1202(c)(9)'s definition of burglary, *e.g.*, *United States* v. *Hill*, 863 F.2d at 1581-82; the Fourth and Ninth Circuit's reference to the elements at common law, *e.g.*, *United States* v. *Sherbondy*, 865 F.2d at 996; or the First Circuit's case-by-case evaluation of the elements underlying the conviction sought to be used as a predicate offense, *e.g.*, *United States* v. *Patterson*, 882 F.2d 595, 604 (1st Cir. 1989)[7]; a tacit consensus exists that the preferred approach for determining whether a conviction is a predicate offense should be based on its elements, not the underlying conduct. As discussed below, the only remaining issue is how to define the test in a way that circumscribes the violent elements of burglary for enhancement purposes, so that Congress' intent is effectuated: a test that will ensure that

---

[7] Insofar as *Patterson* holds that an element of "felonious breaking and entering presents 'a serious potential risk of physical injury to another,'" 882 F.2d at 604, petitioner submits that *Patterson* was wrongly decided: its holding condemns as predicate offenses those burglaries which do not involve conduct that presents a serious risk of physical injury to another. *See infra*, pp. 28-30.

convictions for burglaries that do not present a serious risk of potential injury to another are not included as predicate offenses.

B. For Purposes Of Sentence Enhancement Under § 924(e)(2)(B), Burglary Should Be Defined As Any Crime Punishable By A Term Of Imprisonment Exceeding One Year And Consisting Of Entering Or Remaining Within A Building That Is Property Of Another With Intent To Engage In A Federal Or State Offense *That Involves As An Element Necessary For Conviction Conduct That Presents A Serious Potential Risk Of Physical Injury To Another.*

As set forth *supra* at 15-19, the expressed intent of Congress is to include as predicate offenses those burglaries which involve conduct that presents a serious potential risk of physical injury to another. Further, we have argued that whether a particular state conviction is a "violent felony" is a matter of federal law to be applied uniformly through the evaluation of state convictions based upon their elements. *See supra* at 23-28. Specifically applied to burglary as a predicate offense, Congress therefore intended that courts examine an underlying state conviction to determine whether an element of the crime necessary for conviction includes "conduct that presents a serious potential risk of physical injury to another."

According to the Government, the proper definition of "burglary" is the repealed, former definition of burglary from "the original version of Section 924(e)." Brief In Opposition To Certiorari at 11. That definition provided that burglary was:

> any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining within a building that is property of another with intent to engage in conduct constituting a Federal or State offense.

Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 456, 458-59 (1986) (essentially reincorporating former § 1202(c)(9) with minor changes into § 924 (e)).

This definition broadly encompasses nearly all forms of burglary, including those which present a serious potential risk of physical injury to another and those that do not. The legislative history contains no specific indication of why this particular provision was repealed, nor any criticism of its operation or effectiveness. Implicit in the Congressional debate about what property offenses to include as predicate offenses, however, is that the definition was overbroad, due to its inclusion of "non-violent" burglaries. As the only definition from the former enhancement statute that applied to crimes against property, former § 924(e) may nonetheless supply a starting point from which to draft a definition of "burglary." In order to effectuate Congressional intent, this Court should modify the prior definition by eliminating as predicate offenses those crimes which do not involve a serious potential risk of physical injury to another.

Petitioner suggests that this Court adopt the following definition for burglary as that term is used in 18 U.S.C. § 924(e)(2)(B)(ii):

> Burglary is any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense that has as an element necessary for conviction conduct that presents a serious risk of physical injury to another.

This definition, while employing language from repealed Section 924(e), effectuates Congressional intent by eliminating "non-violent" burglaries as predicate offenses.[8]

Petitioner further suggests that conduct which presents a "serious potential risk of physical injury to another" occurs when a burglar: (1) enters or remains in an occupied building; (2) is armed with a deadly weapon or explosives; (3) causes or threatens immediate physical

[8] Despite the presumption that Congress intends the common law meaning when it uses without definition terms like "burglary" which have an established common law meaning, *United States* v. *Turley*, 352 U.S. 407, 411 (1957), petitioner doubts that Congress intended the common law meaning of burglary to control the definition of "violent felony" in the enhancement statute. *But see United States* v. *Chatman*, 869 F.2d 525, 529-30 (9th Cir. 1989); *United States* v. *Headspeth*, 852 F.2d 753, 758 (4th Cir. 1988). The definition is so anachronistic that only 5 of the 36 states surveyed in *United States* v. *Hill* retain it. 863 F.2d 1575, 1582 & n.5 (11th Cir. 1989). Thus, application of the common law definition would result in two alternative consequences, neither of which seem likely to comport with Congressional intent or advisable as a matter of policy. One of those consequences would be to require "mini-trials" in the vast majority of states that do not retain the common law definition as a specific offense. The sentencing court in those states would have to examine the underlying conduct, beyond the elements of the conviction itself, in order to ascertain whether the facts of a particular offense fit the restrictive common law definition. Even under the more manageable alternative, *i.e.*, examining whether the statute upon which a prior conviction was based necessarily includes all of the elements of common law burglary, the result would be effectively to read the word "burglary" out of the statutory definition of "violent felony." Most states do not have common law burglary as a separate offense, so they probably will not have as elements to be proved for conviction proof that the offense occurred at night and in a dwelling.

However, and as noted at n. 9 below, use of the common law definition is preferable to that employed by the Eighth Circuit and to the standard urged by the Government.

injury to anyone who is not a participant in the crime; and/or (4) flees upon investigation by any person.

Similarly, for the reasons stated above, the catchall clause of § 924(e)(2)(B)(ii) (". . . or otherwise involves conduct that presents a serious potential risk of physical injury to another") should be construed so as to include only those crimes which include such risks as an element of the offense.

C. The Possibility That Some Burglary Convictions Involving Conduct That Presents A Serious Risk Of Physical Injury To Another Will Not Qualify As Enhancement Offenses Under Petitioner's Proposed Test Is Outweighed By The More Fundamental Concern That Alternative Tests Will Result In the Drastic Sentence Enhancement Of Persons Not Intended By Congress To Be Subject To Enhancement.

Burglary statutes fall into three categories: those that necessarily involve an element that presents a serious potential risk of violence to another person, those that do not, and those that *may but do not necessarily* involve an element that presents such a risk. *Compare* Fla. Stat. Ann § 810.02 (defining first degree burglary with elements that involve serious potential risk of injury to others; second degree burglary with mixed elements; and third degree burglary without such elements); Cal. Penal Code §§ 459, 460 (burglary second degree involves conduct ranging from shoplifting to armed burglary of occupied structure and is defined with same elements); *and* Mo. Rev. Stat. § 560.070 (1969) (repealed 1979) (defining second degree burglary as entry in building with intent to steal when there is present either (1) "any human" (potential risk of injury to another), or (2) "any goods . . . or other valuable thing" (no potential for physical risk to another)). *See* pp. 19-22, *supra*.

Petitioner recognizes that his suggested definition may have the effect of disqualifying convictions arising under the third category of burglary statutes noted above (*i.e.*, those which may involve either or both potentially violent and non-violent conduct) from use for purposes of enhancement. This is because such statutes do not necessarily have as an element necessary for conviction conduct that presents a serious potential risk of physical injury to another. We also anticipate that the Government will argue that this will result in individuals engaging in potentially violent conduct being excused under Federal law from the ordinary consequences of their conduct, merely because their crime arose in a state having a "third category" statute.

As a practical matter, however, in many instances it is impossible to determine whether convictions arising under such statutes in fact involve the requisite risk of physical injury to others. In cases tried under these statutes, it will frequently be unclear whether a jury's verdict of guilt was based on potentially violent conduct, potentially non-violent conduct, or both. Was the defendant armed when he engaged in shoplifting? If he broke into a bank (former Mo. Rev. Stat. § 560.075 (1969) (repealed)) did he use explosives to gain entry (former Mo. Rev. Stat. § 560.100)? A mere verdict of guilt, absent seldom-used devices like special interrogatories, will not answer these potentially dispositive questions.

In any event, the possibility that potentially violent actors will not be fully punished is far outweighed by the *certainty* that many "non-violent" burglars *will* face drastic enhancement under either the Government's suggested test or the definition employed by the Eighth Circuit below. This result—which unquestionably is at odds with the subject statutory language, "violent felony"

—offends principles of due process. "A penal statute must define the criminal offense . . . in a manner that does not encourage arbitrary and discriminatory enforcement." *United States* v. *Chatman*, 869 F.2d 525, 527 (9th Cir. 1989), *quoting Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). The Government's suggested test, however, is overbroad in favor of the Government and therefore violates the axiom that penal statutes are to be strictly and narrowly construed in favor of the defendant. *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 285 (1978). Moreover, since these "third category" statutes are undeniably overbroad, at least for purposes of enhancing federal firearm possession sentences, the rule of lenity mandates that § 924(e) be construed so as to limit their applicability. *See generally Bifulco* v. *United States*, 447 U.S. 386, 387 (1980).[9]

V. Petitioner's Convictions For Burglary Second Degree Are Not Predicate Offenses For Sentence Enhancement Under 18 U.S.C. § 924(e)(2)(B)(ii) Because The Government Has Not Demonstrated That The Pertinent Burglary Statutes Have An Element Necessary For Conviction That Involves A Serious Potential Risk Of Physical Injury To Another.

Petitioner was convicted in 1963 and 1971 of burglary second degree under Missouri law. Notice of Punishment

---

[9] Even if this Court chooses not to accept petitioner's proffered definition, for fear that some "violent" burglaries will slip through the cracks, neither of the standards advocated by the Government and the Eighth Circuit, respectively, should be used in its stead. Considerations of fundamental fairness and process, as well as the rule of lenity, would mandate either that (1) the Court adopt the definition of common law burglary or (2) factual inquiry be made on a case-by-case basis into would-be predicate offenses in order to ensure that the requisite risk of violence existed. *See generally Liparota* v. *United States*, 471 U.S. 419, 427 (1985).

Enhancement ¶ ¶ 1-2, J.A. 6-7. The certified convictions obtained by the Government for these offenses fail to identify the specific statutory provision under which petitioner's convictions were obtained. J.A. 26, 30. At the times that petitioner was convicted, Missouri had seven separate statutory provisions that each identified a different form of burglary, depending on the type of structure that was involved, all of which were "burglary in the second degree."[10]

These provisions permitted conviction for conduct that may or may not have presented a serious risk of physical injury to another. Six of the burglary statutes did not distinguish between whether the burglarized structure was occupied or not, and did not address whether the perpetrator was armed. *See* n. 10, *supra*. The remaining statute has as an element of the offense the requirement that there not be any person in the building, and it, like the others, did not address whether or not the burglar was armed. Mo. Rev. Stat. § 560.080 (1969) (repealed 1979) ("Burglary—breaking and entering vacant building").

---

[10] Mo. Rev. Stat. § 560.045 (1969) (repealed 1979) (Burglary of dwelling not in first degree); *id.* § 560.050 (Burglary involving breaking out of dwelling); *id.* § 560.055 (Burglary involving breaking inner door); *id.* § 560.060 (Burglary after being admitted with consent of occupant); *id.* § 560.070 (Burglary involving breaking and entering enclosures besides dwelling places); *id.* § 560.075 (Burglary involving bank buildings); *id.* § 560.080 (Burglary—breaking and entering vacant building).

All seven of these offenses vary according to the structure that is violated without considering whether the structure is occupied (except for *id.* § 560.080) and without considering whether the burglar is armed or engaged in any action that threatens others. They thus include within their scope both conduct that presents a serious potential risk for physical injury to others and conduct that does not.

None of the burglary second degree statutes in effect at the time of petitioner's conviction contained an element necessary for conviction that involved conduct presenting a serious risk of potential physical injury to another. None of petitioner's convictions for burglary second degree qualify as predicate offenses under the suggested test articulated above.

Therefore, petitioner has only two convictions that are predicate offenses. Notice of Punishment Enhancement ¶ ¶ 3-4, J.A. 7, 34 n.2. The district court thus erred in sentencing petitioner under § 924(e), and the Eighth Circuit erred in affirming the sentence. Accordingly, the court of appeals' judgment must be reversed and remanded for re-sentencing under 18 U.S.C. § 924(a)(1) (Supp. V 1987).

CONCLUSION

For the reasons stated herein, petitioner respectfully requests the Court to reverse the judgment of the United States Court of Appeals for the Eighth Circuit and remand the case for re-sentencing under the statute that provides a maximum term of imprisonment of five years with a chance for parole, 18 U.S.C. § 924(a)(1) (Supp. V 1987) (subsequently amended by 18 U.S.C.A. § 924(a)(1) (West Supp. 1989).

Respectfully submitted,

BRUCE DAYTON LIVINGSTON
(Appointed by this Court)
Counsel of Record
Guilfoil Petzall & Shoemake
100 N. Broadway, Suite 2000
St. Louis, MO 63102
(314) 241-6890

J. BENNETT CLARK
Gallop Johnson & Neuman
101 S. Hanley Road, Suite 1600
St. Louis, MO 63105
(314) 862-1200
Counsel for Petitioner

APPENDIX

APPENDIX

18 U.S.C. § 924(a)(1) (Supp. V 1987) (Repealed) provides in pertinent part:

> (a)(1) Except as otherwise provided in paragraph (2) of this subsection, subsection (b) or (c) of this section, or in section 929, whoever—
>
> * * *
>
> (B) knowingly violates subsection (a)(4), (a)(6), (f), (g), (i), (j), or (k) of section 922:
>
> * * *
>
> shall be fined not more than $5,000, imprisoned not more than five years, or both, and shall become eligible for parole as the Parole Commission shall determine.

18 U.S.C. (Appendix) § 1202(c)(9) (Supp. II 1984) (Repealed) provides:

> (9) "burglary means any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense.

Fla. Stat. Ann. § 810.02 (West Supp. 1989) provides:

> (1) "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.
>
> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender:
>
> (a) Makes an assault or battery upon any person.
>
> (b) Is armed, or arms himself within such structure or conveyance, with explosives or a dangerous weapon.
>
> (3) If the offender does not make an assault or battery or is not armed, or does not arm himself, with a dangerous

weapon or explosive as aforesaid during the course of committing the offense and the structure or conveyance entered in a dwelling or there is a human being in the structure or conveyance at the time the offender entered or remained in the structure or conveyance, the burglary is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Otherwise, burglary is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Cal. Penal Code § 459 (West 1988) provides:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

Cal. Penal Code § 460 (West 1988) provides:

1. Every burglary of an inhabited dwelling house or trailer coach as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.

2. All other kinds of burglary are of the second degree.

3. This section shall not be construed to supersede or affect Section 464 of the Penal Code.

Mo. Rev. Stat. § 569.160 (1986) provides:

1. A person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly

remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, he or another participant in the crime:

(1) Is armed with explosives or a deadly weapon; or

(2) Causes or threatens immediate physical injury to any person who is not a participant in the crime; or

(3) There is present in the structure another person who is not a participant in the crime.

2. Burglary in the first degree is a class B felony.

Mo. Rev. Stat. § 569.170 (1986) provides:

1. A person commits the crime of burglary in the second degree when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.

2. Burglary in the second degree is a class C felony.

Mo. Rev. Stat. § 560.040 (1969) (Repealed) provides:

Every person who is convicted of breaking into and entering the dwelling house of another, in which there is at the time some human being, with intent to commit some felony or to steal therein, either: First, by forcibly bursting or breaking the wall or outer door, window or shutter of a window of such house or the lock or bolt of such door, or the fastening of such window or shutter; or, second, by breaking in any other manner, being armed with some dangerous weapon, or with the assistance and aid of one or more confederates, then actually present, aiding and assisting; or third, by unlocking an outer door by means of false keys, or by picking the lock thereof, shall be adjudged guilty of burglary in the first degree.

Mo. Rev. Stat § 560.045 (1969) (Repealed) provides:

Every person who is convicted of breaking into a dwelling house, with intent to commit a felony or to steal, but under such circumstances as do not constitute the offense of burglary in the first degree, shall be deemed guilty of burglary in the second degree.

Mo. Rev. Stat § 560.050 (1969) (Repealed) provides:

> Every person who enters into the dwelling house of another in such manner as not to constitute any burglary as hereinbefore specified, with intent to commit a felony or to steal, or, being in the dwelling house of another commits a felony or steals, and breaks any outer door, window, or shutter of a window, or any other part of said house to get out of the same, shall be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.055 (1969) (Repealed) provides:

> Every person, who having entered the dwelling house of another through an open outer door or window or other aperture not made by such person, breaks an inner door of the same house, with intent to commit any felony or to steal, shall be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.060 (1969) (Repealed) provides:

> Every person who, being admitted into any dwelling house, with the consent of the occupant thereof, or who, being lawfully in such house, breaks an inner door with intent to commit a felony or tc steal, shall be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.070 (1969) (Repealed) provides:

> Every person who shall be convicted of breaking and entering any building, the breaking and entering of which shall not be declared by any statute of this state to be burglary in the first degree, or any booth or tent, or any boat or vessel, or railroad car in which there shall be at the time any human being or any goods, wares, merchandise or other valuable thing kept or deposited, with the intent to steal or commit any crime therein, shall, on conviction, be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.075 (1969) (Repealed) provides:

> Every person who shall break and enter into any banking house or bank building in which there shall be at the time any money, notes, checks, goods, wares, merchandise or other valuable things kept or deposited, with intent

> to steal, or commit any felony therein, shall, on conviction, be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.080 (1969) (Repealed) provides:

> Every person who shall be convicted of breaking and entering any vacant building, in which there shall be no human being, and in which there shall be no goods, wares, merchandise, or other valuable thing kept, and shall take or attempt to take or tear or remove from its place in said building, any lead pipe, brass or copper, or any other valuable thing attached to or being a part of said building with intent to steal or to commit any felony therein, shall, upon conviction, be adjudged guilty of burglary in the second degree.

Mo. Rev. Stat. § 560.100 (1969) (Repealed) provides:

> A person who, with intent to commit some crime, breaks and enters any building in the nighttime, and, for the purpose of committing any crime, uses or attempts to use nitroglycerine, dynamite, gunpowder or any other high explosives, is guilty of burglary with explosives.